UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24

McALLISTER TOWING AND TRANSPORTATION CO, INC. PUERTO RICO BRANCH and INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO	CASE NO. 12-CA-146711

McALLISTER TOWING & TRANSPORTATION CO, INC. PUERTO RICO BRANCH'S BRIEF IN SUPPORT OF EXCEPTIONS

TO THE HONORABLE BOARD:

COMES NOW, McAllister Towing and Transportation Co., Inc., Puerto Rico Branch, (hereinafter "**McAllister**" or "**the Company**"), through the undersigned counsel, and very respectfully prays as follows:

I. Introduction:

On August 3, 2015, the National Labor Relations Board, Subregion 24 (hereinafter "N.L.R.B.") issued a formal Complaint and Notice of Hearing against McAllister. Therein, the NLRB alleged that: (1) on November 24, 2014, Capt. Jose M. Colón (hereinafter "Colón") requested to leave McAllister's vessel at a time when no job was pending; (2) on December 4, 2014, McAllister deducted points from Colón's performance evaluation; (3) on December 9, 2014, McAllister issued a written warning to Colón.

Pursuant to the Complaint said alleged conduct from McAllister restrained and coerced Colón in the exercise of his rights guaranteed under Section 7 of the Act, in violation of Section

8(a)(1), and was also an act of discrimination in violation of Section 8(a)(3) of the Act. (29 U.S.C. Sec. 158(a)(1) and (3)). The NLRB also claimed that McAllister failed to bargain in good faith by refusing to provide certain relevant information requested by the Union. The Trial was held on October 23, 2015, and December 14-15 2015 before an Administrative Law Judge ("ALJ").

With the present Brief, McAllister will demonstrate that it proved during the Trial that it did not incur in an unfair labor practice and did not discriminate against Colón. More specifically, McAllister showed during the Trial that the General Counsel was unable to comply with the *prima facie* burdens in both the 8(a)(1) and 8(a)(3) claims. McAllister also demonstrated that far from discriminating against Colón, it basically decided to give him a written warning and deduct two (2) points from his performance evaluation in the Ethics section, as opposed to a harsher disciplinary action for his abusive, disrespectful, and insolent behavior. In other words, he merely received a slap on the hand, when he could have gotten a harsher punishment, like a suspension or even a discharge.

In any case, as will be shown herein the evidence presented during Trial should result in the dismissal with prejudice of all the above mentioned claims.

II. Procedural Statement of the Case:

On this same date, McAllister filed its Exceptions to the Decision of the ALJ. In essence, it is very respectfully submitted that based on the evidence, the applicable case law and contradictions by the ALJ it is warrant that this Honorable Board refuse to adopt the findings of facts and conclusions of law made by the ALJ, as well as his recommended remedies, order and notice.

III. ARGUMENT IN SUPPORT OF THE EXCEPTIONS[1]:

A. Colón did not engage in concerted or protected conduct in violation of Section 7 of the National Labor Relations Act

Section 7 of the National Labor Relations Act (hereinafter "the Act" or "N.L.R.A.") grants employees the right to join or assist labor organizations, to bargain collectively, and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. Sec. 157). An employer will incur in a violation of these rights, by engaging in the unfair labor practices described in Section 8 of the Act such as: (1) to interfere with or coerce employees in the excise of their rights under Section 7; and (2) to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. [(29 U.S.C Sec. 158 (a)(1) and (3)]

An employer violates Section 8(a)(1) of the Act if it disciplines an employee because of his union activity. N.L.R.B. v. Arkema, Inc., 710 F.3d 308, 315 (2013). To demonstrate that such violation occurred, the General Counsel must show that: (1) an adverse employment action was taken against an employee who was engaged in protected activity; (2) that the employer knew it was such; (3) that the basis of the adverse employment action was an alleged act of misconduct in the course of the protected activity; and (4) that the employee was not, in fact, guilty of that misconduct. N.L.R.B. v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964)

Colón's actions on November 22, 2014 object of the present litigation, are not protected by Section 7 of the Act. To the contrary, the whole incident which happened on November 22, 2014, occurred simply because he wanted to go home early on his last day of his four (4) day work shift.

[1] McAllister incorporates by reference all the facts and discussions made in the Trial Brief.

Colón tried to argue that the Company failed to comply with Section 10 of the Collective Bargaining Agreement on November 22, 2014, since he had not been granted the eight (8) hours of uninterrupted rest at home, and as such he was asking the Dispatcher to comply with the labor contract. The Collective Bargaining Agreement in Section 10, requires the Company to make an honest effort to grant the employees eight (8) hours of rest at home during their shift. (**See. Joint Exhibit 1, Section 10, p. 9**)

The facts however show that Colón was not invoking his rights under the Collective Bargaining Agreement, since he had already had more than eight (8) hours of uninterrupted rest at home. (**See, McAllister's Exhibit 18**) Colón tried to explain his position by testifying that the nine (9) hours of rest he was granted on November 22, 2014, corresponded to the day before (November 21). We submit that this was Colón's intent to mislead the ALJ during the Trial. However, once he was confronted with the Crew Work Hours Reports for November 19, 20, 21, and 22, his absurd explanation collapsed. These four (4) Crew Work Hours Reports clearly show that Colón rested at home for more than eight (8) hours on every day he was scheduled to work[2]. Ironically, on November 22, 2014, he actually rested at home for a total of nine (9) hours. (**See, Joint Exhibit 17)** Therefore, it is a fact that McAllister made an honest effort to grant Colón at least eight (8) hours of rest at home during all of the four days of his shift.

Colón's four (4) calls to Ramos and his disrespectful conduct is not protected conduct. Captains on the last day of their shifts upon finishing their last scheduled work of the day,

[2] Colón's four (4) day's work schedule started at 0000 of November 19, 2014, and concluded at hour 2400 on November 22, 2014. It is relevant to note that every single day he was granted his eight (8) hours resting at home periods. Specifically, on November 19, 2014 he rested at home for eight (8) hours. On November 20, 2014 he rested at home a total of nine (9) hours. On November 21, 2014 he rested at home for eight (8) hours and twenty five (25) minutes. Finally, on his last day of his shift, he rested at home for a total of twelve (12) hours, of which nine (9) were uninterrupted. (**See, Joint Exhibit 17**)

usually ask the Dispatcher if they can go home early. (**See, TR: p. 222, L. 2-25; p. 224, L. 1-14**). Thus, the evidence is clear that such statement by Colón was not an invocation of his rights under Section 7, but simply an inquiry as to whether or not he could go home early. Clearly, going home early with pay is not a protected right under Section 7 or the Collective Bargaining Agreement, moreover, when, as the evidence shows, he had already taken his uninterrupted rest at home.

The ALJ incorrectly concluded that Colón did engage in protected activity because he was allegedly fighting for his and his crews right to leave the ship, but this incorrect premise is belied by the abundant evidence which shows that the captains and their crews are always allowed to leave when there is no scheduled work. The only requirement is that if they leave they do so at their own risk. That is exactly what the dispatcher was explaining to Colón on the four (4) times he harassed Ramos to ask him to leave. This is not protected conduct given that there was no concerted activity being displayed. Colón simply wanted to leave early given that this was his last day of his four (4) day shift. Most egregious yet, he had already rested at home on that same 24 hour period. **ALJ's Decision p. 12, L. 35-50, p. 13, L. 1-50**

i. Even assuming, *arguendo*, that Colón did in fact engage in concerted activity, he did so in such abusive manner that he lost his protection under the Act.

The General Counsel argued that Colón was invoking his Interboro rights under the Collective Bargaining Agreement, and as such his conduct with the Dispatcher is covered and protected under Section 7 of the Act. This argument fails. Even arguendo, that Colón was engaged in protected activity, something McAllister vehemently denies, he did so in such an

abusive manner that he lost his protection under the Act under the doctrine established by the Supreme Court in N.L.R.B. v. City Disposal Systems Inc., 465 U.S. 822, 837 (1984).

In Interboro Contractors, Inc. v. John Landers and William Landers, 157 NLRB No. 110 (1966), the Board held that if a complaint is made by a sole protagonist, it still may constitute protected activity if it was made in an attempt to enforce the provisions of the existing collective bargaining agreement. Id. at p. 1298. In other words, an individual's assertion of a right grounded in a collective bargaining agreement is recognized as concerted activity, and therefore accorded protection under Section 7.

In N.L.R.B. v. City Disposal Systems Inc., 465 U.S. 822 (1984) the Supreme Court of the United States ratified the "*Interboro* doctrine" explaining that the language of Sec.7 of the Act.:

> does not confine itself to situations where two or more employees are working together at the same time and the same place toward a common goal, or to situations where a lone employee intends to induce group activity or acts as a representative of at least one other employee. The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. The *Interboro* doctrine is entirely consistent with the Act's purposes, which include the encouragement of collective bargaining and other practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions. Id. at p. 823-824

However, **the fact that an individual's activity could be considered "concerted", does not mean that an employee can engage in the activity with impunity**. In fact, the Supreme Court was emphatic in holding that "an employee may engage in concerted activity in such an abusive manner that he loses the protection. Id. at p. 837.

It is well established that not all union activity or concerted action can be construed as protected activity. N.L.R.B. v. Superior Toll & Die Co., 309 F.2d 692, (6th Cir. 1962). Specifically, harassment and intimidation are not protected union activities. Also, offensive and

hostile language is not protected, even if under the guise of union activity. "In the simplest terms, it is preposterous that employees are incapable of organizing a union or exercising their other statutory rights under the N.L.R.A. without resort to abusive or threatening language." Paramount Min. Corp. v. N.L.R.B., 631 F.2d 346, 348 (4th Cir. 1980).

Union supporters are not at liberty to intimidate or coerce other employees. When employees resort to that kind of conduct, they take a position outside the protection of the statute and accept the risk of discharge upon grounds aside from the exercise of the legal rights which the Act protects." N.L.R.B. v. Arkema, Inc., 710 F.3d 308, 316 (2013)

Moreover, even if such activities are in protest of conditions of employment; concerted activity that is unlawful or insubordinate is not protected nor is concerted activity that is "indefensible", such as libeling an employer in an attempt to ruin his business. Hagopian & Sons, Inc. v. N.L.R.B., 395 F.2d 692 (6th Cir. 1968). Further, concerted activity that irresponsibly exposes an employer's property to possible damage or that constitutes insubordination or disloyalty may be found to fall outside the scope of the Act, even if undertaken in the interests of self-organization or collective bargaining. Texas Instruments, Inc. v. N.L.R.B., 637 F.2d 822 (1st Cir. 1981). In sum, and as the Supreme Court of the United States has held, "an employee may engage in concerted activity in such an abusive manner that he loses the protection. N.L.R.B. v. City Disposal Systems Inc., 465 U.S. 822, 837 (1984)

With this framework in mind let's examine Colon's conduct as evidenced during the Trial. At around 1600 hours, which is approximately eight (8) hours before Colón's shift ended, he began to call Ramos, who was acting as Dispatcher, to inquire as to what was he going to do with them. Ramos explained to him, that he had to rest at pier, because they were the only crew

available at that time, and Colón's crew had already spent more than eight (8) hours of uninterrupted rest at home that day[3]. Colón had actually rested at home **nine (9) hours.** He also told Colón that they needed to have at least one (1) crew ready in case of an unforeseen need for service. Notwithstanding said explanation, Colón called him four (4) times with the same question. (**See, McAllister's Exhibits 18-19; see also, TR: p. 214, L. 20-25; p. 215, L. 1-15; p. 220, L. 10-25; p. 221, L. 7-10; p. 222, L. 2-25; p. 286, L. 2-14; p. 223, L.1-23; p. 224, L. 1-14**)

After the third call Colón with exactly the same inquiry, Ramos decided to contact González in order to ascertain that the instructions were that Colón had to rest at the pier. González corroborated the information, but while they were still talking on the phone, Colón called the fourth time but through the VHF radio, and asked the same question. Ramos, who was still on the phone talking to González, explained to Colón once again that he had to rest at pier. Colón responded, in an insolent and disrespectful manner that he was abandoning his post. Ramos told Colón that if he left he would write it up in the "Logbook"; to which Colón "**exploded**" by stating that he did not care if he wrote it in the "Logbook", the Bible, called Mr. Jaime Santiago, or Mike Ring, or the Company president, that he was leaving. . (**See, TR: p. 224, L. 15-25; p. 225, L. 1-25; p. 227, L. 7-25; p. 228, L. 2-9; p. 231, L. 6-7; p. 232, L. 1-10; p. 287, L. 14-25; p. 288, L. 4-25; L. 289, L. 1-25; p. 397, L. 16-25**)

González heard Colón's disrespectful utterances since he was still on the phone with Ramos. González agreed with Ramos that Colón was disrespectful; and that he should write it in

[3] Colón testified in the Trial that Ramos was restraining him to the tugboat. His testimony was controverted by Ramos, González and Feliciano. **See, McAllister's Exhibits 18-21; see also TR: p. 214, L. 20-25; p. 215, L. 1-15; p. 220, L. 10-25; p. 221, L. 7-10; p. 222, L. 2-18; TR: p. 229, L. 2-25; p. 230, L. 1-19; p. 231, L. 1-21; p. 286, L. 2-14**; **p. 288, L. 4-25; p. 289, L. 1-25; p. 290, L. 1-2; p. 332, L. 25; p. 333, L. 1-25; p. 334, L. 1-25; p. 335, L. 1-23; p. 337, L. 8-18; p. 342, L. 11-25; p. 343, L. 12-25; p. 344, L. 25; p. 345, L. 1-22; p. 346, L. 10-14**

the "Logbook". (**See, McAllister's Exhibit 16 and 17; see also, TR: p. 229, L. 2-25; p. 230, L. 1-19; p. 231, L. 1-21**; **p. 288, L. 4-25; p. 289, L. 1-25; p. 290, L. 1-2**)

Colón's insolent behavior continued when he called his direct supervisor, Feliciano, and referred to the Dispatchers as **"motherfuckers**" and "**shits**" and stating in an aggressive manner that he was going to abandon his post. If not for Feliciano's intervention with Colón, the consequences of his misconduct would have been more serious consequences. (**See, TR: p. 333, L. 5-25; p. 334, L. 1-25; p. 345, L. 1-8**)

The aforementioned facts clearly show that Colón's behavior was abusive, harassing and threatening. He also used hostile and offensive language, all characteristics which, pursuant to leading case law, are not protected by Section 7 of the Act. N.L.R.B. v. City Disposal Systems Inc., 465 U.S. 822, 837 (1984); N.L.R.B. v. Arkema, Inc., 710 F.3d 308, 316 (2013); Paramount Min. Corp. v. N.L.R.B., 631 F.2d 346, 348 (4th Cir. 1980); Contempora Fabrics. Inc. and United Food & Commercial Workers Union, 344 N.L.R.B. 851 (2005); Hagopian & Sons, Inc. v. N.L.R.B., 395 F.2d 947 (6th Cir. 1968)

Things being as such, it is evident that even if Colón's conduct could be construed as a concerted activity, something McAllister vehemently denies, it is nevertheless not protected by Section 7 of the Act, and thus Colón lacks an actionable claim under Sec. 8(a)(1).

During Trial Colón admitted to the misconduct object to the present litigation. His text message and comments to Feliciano demonstrate without a doubt that Colón disrespected Ramos. (**See, McAllister's Exhibit 20; see also, TR: p. 342, L. 11-25; p. 343, L. 12-25; p. 344, L. 25; p. 345, L. 1-22; p. 346, L. 10-14)** Moreover, González heard the conversation between Ramos and Colón where the Captain exploded and told the Dispatcher to write it in the Bible, to

call Mike Ring and other executives of the Company. (**See, TR: p. 229, L. 2-25; p. 230, L. 1-19; p. 231, L. 1-21**; **p. 288, L. 4-25; p. 289, L. 1-25; p. 290, L. 1-2**) González's testimony remained unchallenged by the General Counsel and the International Organization of Masters Mates and Pilots ("IOMMP"). Finally, the Memo of the facts that Ramos prepared at the request of Mike Ring also confirms Colón's misconduct. (**See, McAllister's Exhibit 20**)

The ALJ went to great lengths to conclude that Colón did not harass the dispatchers or was in anyway disrespectful towards them, however he conveniently forgot to place any weight to the incredibly material and crucial fact that he referred to them as "**mother fuckers"** and "**shits"**. This "omission" undermines the correct evaluation of the facts, and forces a determination that Colón's behavior is not protected by law. N.L.R.B. v. City Disposal Systems Inc., 465 U.S. 822, 837 (1984); N.L.R.B. v. Arkema, Inc., 710 F.3d 308, 316 (2013); Paramount Min. Corp. v. N.L.R.B., 631 F.2d 346, 348 (4th Cir. 1980); Contempora Fabrics. Inc. and United Food & Commercial Workers Union, 344 N.L.R.B. 851 (2005); Hagopian & Sons, Inc. v. N.L.R.B., 395 F.2d 947 (6th Cir. 1968).

Further, the ALJ's attempt to undermine McAllister's ample evidence by theorizing that Colón's insolent conduct was not properly documented in his written warning is also faulty. This issue is immaterial given that it is McAllister's prerogative and not the ALJ to determine what language they choose to include in the warning letter. The fact that the terms mother fucker and shits were not specifically included, cannot justify the ALJ's conclusion that his behavior did not deserve a written warning, much less demonstrate that there was some king of anti-union bias by McAllister. We respectfully submit that the ALJ committed a grave error by putting himself in McAllister's shoes and basically acting as a super-personnel department reexamining the

Company's legitimate business decisions. This is a behavior is specifically prohibited by all federal case law including NLRB.

It is recognized that the Board does not determine whether a "nondiscriminatory reason for [employment action] is wise or well supported." 6 West Limited Corp., 330 NLRB 527fn. 5(2000). "As Respondent points out (with appropriate authority), the Board may not substitute its own business judgment for that of Respondent or act as a **"super-personnel**" department". Even shortsighted or bad business judgments are permissible so long as they are not discriminatory. Pro-Tec Fire Servs. Ltd. and Int'l Assn's of Firefighters, Local 3694, 351 NLRB 52 (2007)

In assessing whether an adverse employment decision is pretextual, the Court does " 'not sit as a super-personnel department that reexamines an entity's business decisions' " González v. El Díaz, Inc., 304 F.3d 63, 69 (1st. Cir. 2002) (quoting Meching v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th. Cir. 1998)). The Court's task is limited to determining whether the employer "believe[d] in the accuracy of the reason given for the adverse employment action." Kouvchinov v. Parametric Tech. Corp., 537 F.3d 62, 67 (1st. Cir. 2008); see also Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 7 (1st. Cir. 2000) ("[T]he question is not whether [plaintiff] was actually performing below expectations, but whether [her employer] believed that she was.") Espinal v. National Grid Ne Holdings 2, LLC, 693 F.3d 31 (2012)

In sum, the General Counsel failed to establish the Section 8 (a) (1) *pima facie* case. On the other hand McAllister clearly demonstrated that Colón was guilty of misconduct and deserved the adverse employment action he received.

B. McAllister did not discriminate against Colón in violation of Sec. 8(a) (3) of the Act.

Under the Act it is considered an unfair labor practice to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. (29 U.S.C. Sec. 158(a) (3)). In order to make a *prima facie* case of a Sec. 8(a) (3) violation for unlawful discrimination:

> the General Counsel has the burden of establishing at least initially, protected activity, of knowledge, animus or hostility, and adverse action on behalf of the employer which tends to encourage or discourage protected activity. The burden then shifts to the employer to persuasively establish by a preponderance of evidence that it would have made the same decision even in the absence of protected activity. Michigan Timber & Truss, Inc., 328 NLRB No. 70 (1999)

In other words, the General Counsel must first make a showing that the "employee's protected union activity was a motivating factor in the adverse employment action. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity. In re Joseph Stallone Electrical Contractors, Inc., 337 NLRB 178 (2002); See also, NLRB v. Wright Line, 662 F.2d 899 (1981)

In light of the above it is evident that the General Counsel must first show three things: (1) the employee engaged in protected activity; (2) the decision maker knew it; and (3) the employer acted because of antiunion animus. Sears, Roebuck & Co. v. N.L.R.B., 349 F.3d 493, 503 (2003). However, during the Trial the General Counsel was not even able to make an initial showing that unlawful motivation played a role in the adverse employment action

i) Colón did not engage in protected or concerted activity

The first element of the *prima facie* case has already been briefed, and thus for the sake of procedural economy see, page 3-5 of the present Brief is adopted by reference herein.

Essentially, for the reasons stated in this Brief Colón did not engage in protected concerted activity. This matter is dispositive in and of itself, but in an abundance of caution McAlister will continue to discuss the reasons why Colón was unable to show that he was discriminated in violation of section 8(a) (3).

ii) McAllister did not have any antiunion animus against Colón

It is important to note that even in the absence of Colón's alleged protected conduct, McAllister would have given Colón the written warning and deducted points in the Ethics section of his 2014 Evaluation.

The only evidence presented by General Counsel to prove employer animus was Iglesias's testimony that Colón is the Union steward and that approximately fifteen (15) years ago certain tugboat Captain allegedly insulted a Dispatcher, but allegedly he was never reprimanded. However, Iglesias was unable to identify the Dispatcher, the context of the situation or confirm that no adverse employment action was taken. But most surprisingly, he was unable to identify what that alleged insult was. (**See, TR: p. 171, L. 20-25; p. 172, L. 1-25; p. 173, L. 1-25; p. 174, L. 1-10**) Given this fact, it is perplexing that the ALJ could have given Iglesias any validity in this matter. It is impossible to accurately compare both situations, much less conclude that it shows that McAllister has an antiunion bias with Colón or treated him differently. Thus, Iglesias's testimony lacks any validity and as such should not be afforded any probative value. It also is important to note that Iglesias testified that he started working at McAllister in 2002 -- thirteen (13) years ago. Therefore, it is obvious that Iglesias was not an employee when allegedly another Captain had insulted a Dispatcher

Further, even if Iglesias's testimony deserved arguendo any validity, it does not demonstrate an antiunion bias by the decision maker, because the alleged event, which he vaguely remembers, according to him occurred fifteen (15) years before Santiago became the Vice President and General Manager for McAllister. It was Santiago the person who decided to give Colón the warning. (**See, TR: p. 171, L. 20-25; p. 172, L 1-25; p. 173, L. 1-25; L. 1-10**)

On the other hand, McAllister presented a plethora of evidence which shows that there was no antiunion bias. Chief among them is the fact that even though Colón disrespected Ramos, and referred to him as a "**motherfucker**" and "**shit**" in his conversation with his direct supervisor, Feliciano, he was given a mere written warning, with a slight deduction in his performance evaluation in the Ethics. (**See, GC's Exhibit 7; see also, TR: p. 290, L. 3-11; p. 317, L. 20-25; p. 318, L. 1-9; p. 399, L. 2-25; p. 400, L. 1-10**) It is respectfully submitted that such conduct could have easily resulted in much harsher adverse employment actions like a suspension or even a discharge.

Further, after Colón threatened to abandon his post, Feliciano, who was on his day off, called him and persuaded him not to abandon his post, even when Colón was acting in an aggressive manner and insulted the Dispatchers while talking to him. Feliciano's efforts clearly show that McAllister does not have an animus against Colón. Had it had such bias, the Company could have simply let him leave and discharged him for abandoning his post and his insolent and harassing behavior. But instead, the Company chose to, as Santiago explained, give him a written warning in the hope that he would improve his conduct. (**See, GC's Exhibit 7; TR: 290, L. 3-11; p. 317, L. 20-25; p. 318, L. 1-9; p. 332, L. 25; p. 333, L. 1-25; p. 334, L. 1-25; p. 335, L. 1-23; p. 337, L. 8-18; p. 345, L. 1-8; p. 399, L. 2-25; p. 400, L. 1-10**)

The General Counsel also tried to prove that the Company discriminated against Colón because he is the Union steward at McAllister and supposedly he is the spokesperson of the IOMMP members. The General Counsel also failed on this attempt. Santiago and Feliciano testified that Colón was the steward in the bargaining table but that Colón had never approached them to vindicate or advocate for the Union members rights. (**See, TR: p. 436, L. 22-25; p. 347, L. 1-3,; p. 408, L. 4-12**).

In addition, the IOMMP counsel tried to create the inference of disparate treatment between Colón and Captain Catalino Soto (hereinafter "Soto") since the Dispatchers Log of November 22, 2014, reflects that Soto was called twice and did not respond. No discriminatory animus can be inferred of this because Soto was enjoying his day off and he had no obligation to answer the call of the Dispatcher. (**See, TR: p. 383, L. 23-25; p. 384, L. 1-2, 13-14; p. 385, L. 1-4**)

iii) Even, *arguendo*, that the General Counsel managed to present a *prima facie* case of discrimination, McAllister established by a preponderance of evidence that it would have made the same decision even in the absence of protected activity.

Finally, assuming for the sake of argument that the *prima facie* case of discrimination has been established, McAllister has demonstrated that even in the absence of Colón's alleged protected conduct, the Company would have taken the same adverse action against him.

McAllister has a clear anti-bulling policy in place, which is explained via internet seminars to all of its employees, including Colón approximately every year. In its relevant part it states:

> Some employees may engage in harassing conduct that has nothing to do with any legally protected characteristics, such as gender, race, religion, etc. – in other words, they are "equally opportunity" harassers. This type of abusive conduct is often referred to as "bullying" and is not covered by current laws prohibiting discrimination, harassment and retaliation in the workplace.
>
> Over the past few years, however, **many countries** have passed comprehensive anti-bullying laws, and **numerous states** in the U.S. are considering similar legislation. The proposed state laws would make it unlawful to subject an employee to an **abusive work environment**, which is defined similarly to a hostile work environment under anti-harassment laws.
>
> Thus, although bullying is not currently illegal in the U.S., it is our policy that every employee, regardless of his or her position, deserves to be treated with civility, dignity and respect. Threatening, intimidating or humiliating speech or conduct will not be tolerated. (**See, McAllister Exhibit 13**)

Further, McAllister has other behavioral policies which proscribe Colón's behavior in the "Bothbooks" of every tugboat. (**See, McAllister Exhibit 12)**

Moreover, Colón admitted that he is familiar with the policy and has even taken various trainings in the Company that among other things, covers the respectful attitude expected from McAllister's personnel. In fact, Colón took a specific training titled "Unlawful Harassment Training". (**See, McAllister Exhibit 5; TR: p. 106, L. 4-14**)

The record also shows that Colón had already been admonished in the past for not responding on a timely manner to dispatcher's calls. (**See, McAllister Exhibits 6, 7, 9 and 10**).

But most importantly, McAllister also presented evidence that they had also admonished other Captains for similar conduct. (**See, Exhibits 22, 23, 24, 25, 26, 27 28 and 29**) These facts contradict any allegation of discrimination against Colón and clearly prove the McAllister, like any employer expects its employees to comply with their duties and responsibilities and maintain a peaceful and safe work environment.

Santiago testified that he met with Feliciano, Colón's direct supervisor, who explained to him that on November 22, 2014, Colón had disrespected Ramos by among other utterances telling him to write his conduct on the Bible, and had called the Dispatchers "motherfuckers" and "shits". He also showed Santiago a text message from Colón in which Colón admitted his wrongdoing and accepted full responsibility for his actions. Further, Feliciano informed Santiago that Colón was continuing with his pattern of not answering the Dispatcher's calls in a timely manner, something which was of great concern to him, because it could result in a loss of service.

During Trial Santiago explained that he decided to give Colón the written warning to let him know that his conduct was not acceptable and it could not happen again. As Santiago testified, he has the responsibility of maintaining peace and order among the employees. (**See TR: p. 400, L. 8-20**) There was no other evidence presented by the General Counsel during Trial which contradicts this statement.

Based on the above, Colón's Section 8(a) (3) cause of action should be dismissed with prejudice.

C. The General Counsel was unable to show that the basis for the adverse employment action was Colón's alleged protected conduct.

This third element of the General Counsel's *prima facie* obligation for a Section 8(a)(1) and (3) case can be similarly disposed. To start, and as has been repeated many times herein, Colón did not engage in protected conduct. This is dispositive in and of itself.

Further, the General Counsel presented no evidence during Trial which demonstrates that the basis for the adverse employment action was Colón's alleged (non-existent) protected conduct. To the contrary, and as explained before, the basis for the adverse employment action

was directly related to Colón's disrespectful, abusive, insolent and harassing attitude to Ramos his insults towards the dispatchers, as well as his pattern of failing to timely answer the dispatcher's calls

The lack of evidence presented by the General Counsel to show a link between the protected conduct and the adverse employment action forces the conclusion that no Sec. 8(a)(3) violation occurred.

WHEREFORE, McAllister very respectfully requests this Honorable Board to dismiss the challenged elements of the Decision and dismiss the Complaint accordingly.

CERTIFICATE OF SERVICE: I hereby certify that on this same date a true copy of this document has been sent by email to Gabriel A. Terrasa, Esq., gterrasa@tslawmd.com, National Labor Relations Board, Margaret J. Diaz, Regional Director, margaret.diaz@nlrb.gov. and Enrique González, Esq., enrique.gonzalezquinones@nlrb.gov.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 12 day of July 2016.

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